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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 716

UNIVERSAL INSURANCE COMPANY
(a corporation),
Petitioner,

vs.

HALL-SCOTT MOTOR CAR COMPANY
(a corporation),
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully presents to this Honorable Court, its petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, to review a decision made and entered by that Court on August 20, 1941 (R-207-8), reversing the judgment

in favor of the petitioner made in the Southern Division of the United States District Court in and for the Northern District of California, on January 15, 1941, and entered January 16, 1941. (R-33-4.) Petition for rehearing, filed in the said Circuit Court of Appeals, was denied on September 22, 1941. (R-208.)

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This case involves the right of a shipyard bailee for hire to contract that he may be free from the consequences of his negligent damage to property entrusted to his care.

This action was brought in the United States District Court for the Northern District of California to recover damages resulting from the almost total destruction by fire of the gasoline power cruiser PACIFICA *while in the custody* of the Hall-Scott Motor Car Company, hereinafter called the respondent. The action was brought on the law side of the Court and jurisdiction was predicated upon diversity of citizenship. The case was tried to the Court without a jury, by stipulation. Judgment was for the plaintiff for the sum of Three thousand two hundred ($3-200.00) Dollars. The District Court found that the fire resulted from the negligence of the respondent. From a judgment in favor of plaintiff and petitioner herein, respondent appealed to the United States Circuit Court of Appeals for the Ninth Circuit.

The PACIFICA had been sold by R. J. Hooper and Mrs. R. J. Hooper, his wife, to R. Jack Hofmann

by conditional sales contract. Hofmann wished to replace the gasoline motor in the PACIFICA with a reconditioned Invader engine belonging to respondent. The PACIFICA was delivered to the respondent for that purpose at respondent's float and boat house in December, 1939.

A conditional sales contract was entered into between the buyer and seller on January 4, 1940, wherein it was agreed that respondent should install the motor in the PACIFICA.

Manuel Marks, an employee of respondent, was working on the vessel on January 5, 1940, preparing for the installation of the motor (after having removed the old engine) when an explosion and fire occurred which resulted in the almost total destruction of the PACIFICA and the death of Manuel Marks. *The boat was, at the time of its destruction, solely in the custody of respondent as a bailee for hire.*

The owners of the vessel were insured against loss by fire with Universal Insurance Company, petitioner herein. Petitioner paid Hofmann and Hooper the fire loss of Three thousand two hundred ($3200.00) Dollars on January 19, 1940, under the terms of the insurance, and was thereupon subrogated to any rights and remedies that Hofmann and Hooper might have to recover for said damage from any third person, including respondent.

Petitioner brought this action against respondent as subrogee of the insured. The complaint contained two counts. The first alleged a delivery of the boat by

the owner to respondent in December, 1939, for the purpose of installing an engine for an agreed consideration. It alleged the total loss of the vessel by fire and the consequent failure to redeliver said vessel.

The second count of the complaint reiterated the facts alleged in the first count and alleged further that the PACIFICA was destroyed by fire on January 5, 1940, because of the negligence of the respondent and its employees.

The answer of respondent admitted the delivery to it of the PACIFICA at its boat house for the purpose of installation of the reconditioned motor under the conditional sales agreement dated January 4, 1940. The answer alleged that the conditional sales contract contained the following agreement:

> "It is understood further Hall-Scott will not be held responsible for any damage to cruiser PACIFICA or for anything taken from same while the engine installation is being made."

The answer also denied negligence on the part of respondent. Because of admissions in the pleadings and stipulations entered into, the only facts in dispute were:

(1) The value of the vessel and the damage thereto. The Trial Court found the damage to be Three thousand two hundred ($3200.00) Dollars and this was not disturbed on appeal, although challenged.

(2) Whether or not the damage to the boat was caused by the negligence of the employees of the respondent. The Trial Court found in favor

of petitioner and this was not disturbed on appeal, although challenged.

(3) Whether the respondent had failed in its contract of bailment to redeliver the boat in good order and condition. The Trial Court found in favor of the petitioner and this was not disturbed on appeal, although challenged.

(4) Whether or not by the clause:

"It is understood further Hall Scott will not be held responsible for any damage to cruiser PACIFICA or for anything taken from same while the engine installation is being made"

respondent shipyard bailee for hire shall be free from the consequences of his negligent damage to property entrusted to his care. The Trial Court found this clause invalid and entered judgment for plaintiff. The judgment of the Trial Court was reversed by the Circuit Court, holding that a shipyard bailee for hire *can* contract against negligence, whereas a towboat bailee for hire *cannot* contract against negligence.

JURISDICTION.

The action was filed in the Southern Division of the United States District Court in and for the Northern District of California, on the law side of the Court. Jurisdiction of the District Court was predicated upon diversity of citizenship and the amount in controversy exceeding, exclusive of interest and costs, the sum or

value of Three thousand ($3000.00) Dollars under Section 24 of the Judicial Code. (28 U.S.C.A. 41.) Petitioner is a corporation organized and existing under and by virtue of the laws of the State of New Jersey and respondent is a corporation organized and existing under and by virtue of the laws of the State of California.

The Circuit Court of Appeals for the Ninth Circuit had jurisdiction of the appeal under Section 128 of the Judicial Code. (28 U.S.C.A. 225.)

This Court has jurisdiction to review the judgment of the Circuit Court of Appeals for the Ninth Circuit under the provisions of Section 240 of the Judicial Code. (28 U.S.C.A. 347.)

The order denying petition for rehearing by the Circuit Court was made and entered on September 22, 1941. (R-208.) This petition will be filed on or before October 29, 1941, or well within the three months allowed by Section 240 of the Judicial Code just cited. A stay of the mandate of the Circuit Court until final disposition by this Court has been obtained. (R-209.)

QUESTION PRESENTED.

The Circuit Court stated the question as follows:

> "Can the parties to a maritime contract to repair a vessel validly stipulate that the repairer may be freed from the consequences of his negligent damage to the vessel in his custody for repairs?" (R-190.)

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The following are the special and important reasons, addressed to the sound discretion of this Court, and relied on for allowance of a writ of certiorari:

(1) The decision of the Circuit Court herein establishes for the first time that a shipyard bailee for hire *can* contract against liability for negligent damage to property entrusted to his care, while recognizing and re-establishing previous decisions that a towboat bailee for hire *cannot* contract against liability for negligent damage of property entrusted to his care.

(2) The admiralty decisions of this Court on towboat bailee for hire cases and the weight of modern common law authorities supports the rule that a bailee for hire *cannot* contract against liability for negligent damage to property entrusted to his care. There is no justification for a distinction between the liability of a shipyard bailee for hire and a towboat bailee for hire. By making such a distinction the Circuit Court brought the admiralty law in hopeless conflict with itself as well as in hopeless conflict with the common law. The admiralty law should be harmonious with itself. The admiralty law should also be harmonious with the common law, if possible. At a time when millions of dollars are being spent in ship repair, the public is entitled to clarity in the law, not conflict and confusion.

(3) The decision of the Circuit Court herein has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision in the following:

There is no justification for the statement of the Circuit Court herein:

> "The practical effect of the agreement between the parties was to give the motor car company the benefit of the fire insurance coverage." (R-202.)

when the same parties subsequently signed mutual releases and which releases stated:

> "and the within release does not purport to be, nor is it a waiver of any claim that the Universal Insurance Company might have by reason of the said payment." (R-203-204.)

Such a finding indicates that the Circuit Court has gone out of its way in such a manner as to indicate a prejudice against the petitioner who had an obligation under its insurance policy and met it, so as to favor a shipyard which is endeavoring to escape a liability that is morally, and we submit legally, theirs.

WHEREFORE, Petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Ninth Circuit, and submits its brief hereto attached, in support of this petition.

Dated, San Francisco, California,
October 22, 1941.

Respectfully submitted,
ROBERT B. GAYLORD,
Counsel for Petitioner.

GEORGE H. HAUERKEN,
Of Counsel.

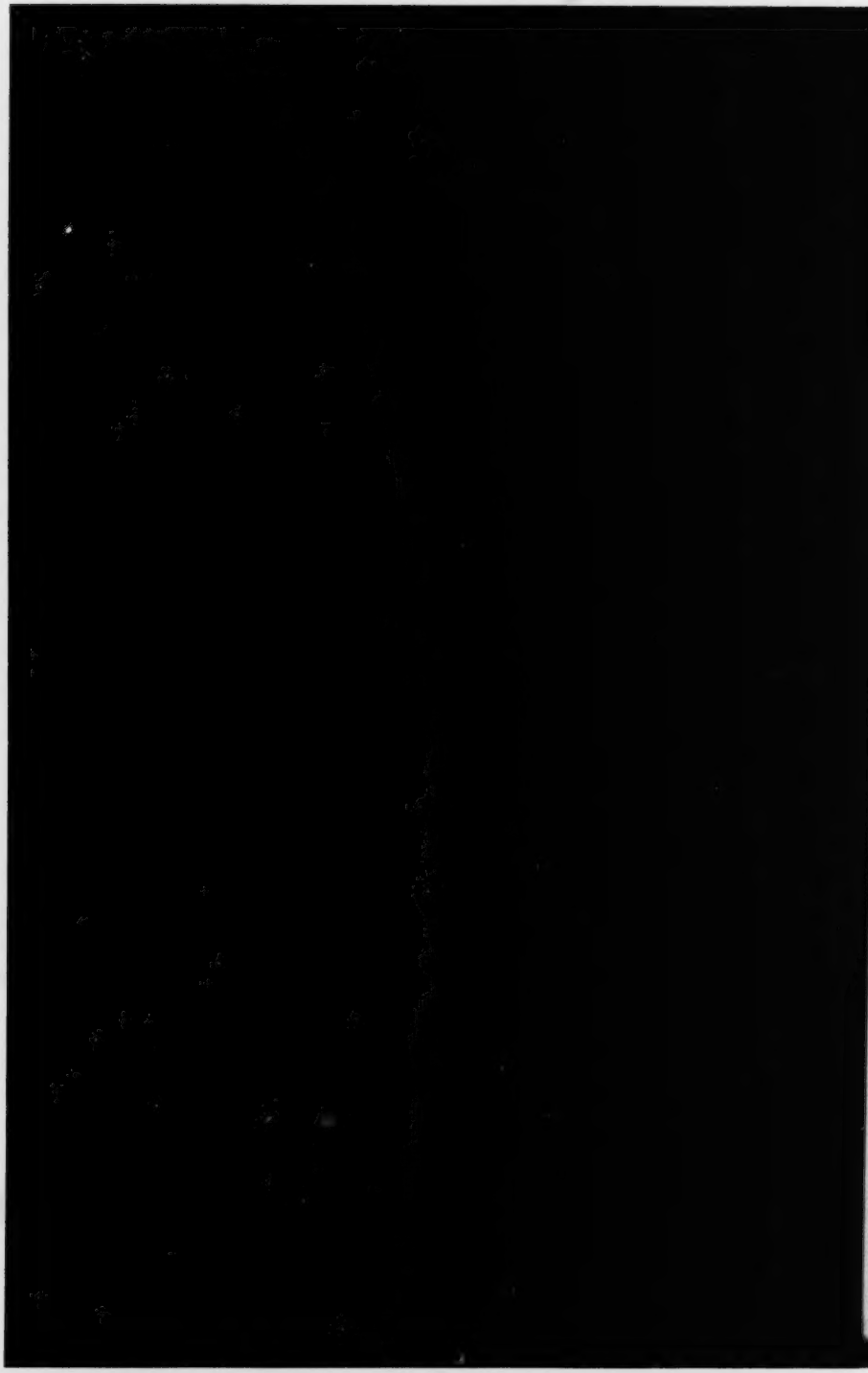
CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition, in my opinion, is well founded and entitled to the favorable consideration of the Court and that it is not interposed for purpose of delay.

Dated, San Francisco, California,
October 22, 1941.

ROBERT B. GAYLORD,
Counsel for Petitioner.

GEORGE H. HAUERKEN,
Of Counsel.



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(a corporation),
Respondent.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW.

The judgment of the District Court was filed on January 16, 1941 (R-33-4) and is not reported in any printed publication. No opinion as such was ever given, the decree being based upon written findings of fact and conclusions of law signed January 15, 1941, and filed January 16, 1941. (R-14-22.)

The opinion of the Circuit Court reversing the decree of the District Court was filed August 20, 1941, (R-184-207) and has not yet appeared in the advance sheets. Judgment was entered thereon on August 20, 1941. (R-207-8.) Petition for rehearing was filed in the Circuit Court on September 16, 1941, and denied on September 22, 1941. (R-208.)

II.

JURISDICTION.

The action was filed in the Southern Division of the United States District Court in and for the Northern District of California on the law side of the Court. Jurisdiction of the District Court was predicated upon diversity of citizenship and the amount in controversy exceeding, exclusive of interest and costs, the sum or value of Three thousand ($3000.00) Dollars, under Section 24 of the Judicial Code. (28 U.S. C.A. 41.) Petitioner is a corporation organized and existing under and by virtue of the laws of the State of New Jersey and respondent is a corporation organized and existing under and by virtue of the laws of the State of California.

The Circuit Court of Appeals for the Ninth Circuit had jurisdiction of the appeal under Section 128 of the Judicial Code (28 U.S.C.A. 225.)

This Court has jurisdiction to review the judgment of the Circuit Court of Appeals for the Ninth Circuit under the provisions of Section 240 of the Judicial Code. (28 U.S.C.A. 347.)

The order denying petition for rehearing by the Circuit Court was made and entered on September 22, 1941. (R-208.) The accompanying petition will be filed on or before October 29, 1941, or well within the three months allowed by Section 240 of the Judicial Code just cited.

III.

STATEMENT OF FACTS.

The power cruiser PACIFICA was sold by R. J. Hooper and Mrs. R. J. Hooper, his wife, to R. Jack Hofmann by conditional sales contract for Three thousand nine hundred nine and 86/100 ($3909.86) Dollars, on June 22, 1939. (R-50-51.) Hofmann wished to replace the gasoline motor in the PACIFICA with a reconditioned Invader engine belonging to the respondent. (R-64.) The PACIFICA was delivered to the respondent for that purpose at respondent's float and boat house in December, 1939. (R-65.)

A conditional sales contract was entered into on January 4, 1940, between Hofmann and the respondent wherein it was agreed that the respondent should remove the old engine and install the new Invader engine in the PACIFICA. (R-55.)

Manuel Marks, an employe of the respondent, was working on the PACIFICA on January 5, 1940, preparing for the installation of the new Invader engine (after having removed the old engine) when an explosion and fire occurred which resulted in the almost total destruction of the PACIFICA and the death of

Manuel Marks. (R-54-55.) The PACIFICA was, at the time of its destruction, solely in the custody of the respondent as a bailee for hire. (R-66-68-69.)

The Circuit Court was apparently misled by the name of the respondent. This was not an isolated transaction of a sale of a motor and the custody of the boat for the purpose of installation. The general nature of the business of the respondent is "handling motors" (R-136), "marine, bus, industrial, all different types". (R-136.) Respondent has made many installations on small boats like the PACIFICA. (R-136.) The business of respondent includes extensive dealings with the public on small boats (R-142-143) and by reason of said extensive dealings with the public, Leland Scott, secretary and sales manager of respondent, qualified as an expert on the witness stand so that he could testify to

(1) The manner in which the removal of the old engine should be effected. (R-137.)

(2) The precautions that must be taken to avoid an explosion and fire. (R-137-138.)

(3) The amount of gasoline usually spilled on such installations. (R-139-140.)

(4) The speed of evaporation of spilled gasoline in the hold of a boat. (R-140.)

(5) Value of small boats, by reason of great number handled by respondent. (R-142-143.)

The owners of the PACIFICA were insured against loss by fire with the Universal Insurance Company,

petitioner herein. (R-49.) Petitioner paid Hofmann and Hooper the fire loss of Three thousand two hundred ($3200.00) Dollars on January 19, 1940, under the terms of the insurance (R-52) and was thereupon subrogated to any rights and remedy that Hofmann and Hooper might have to recover for said damage from any third person, including respondent.

Petitioner brought this action against respondent as subrogee of the insured. (R-1-7.) The complaint contained two counts. The first alleged a delivery of the boat by the owner to respondent in December, 1939, for the purpose of installing an engine for an agreed consideration. It alleged the total loss of the vessel by fire and the consequent failure to redeliver said vessel. (R-1-5.) The second count of the complaint reiterated the facts alleged in the first count and alleged further that the PACIFICA was destroyed by fire on January 5, 1940, because of the negligence of the respondent and its employees. (R-5-7.) The answer of the respondent admitted the alleged delivery to it of the PACIFICA at its boat house for the purpose of installation of the reconditioned motor under the conditional sales agreement dated January 4, 1940. (R-8.) The answer alleged and the conditional sales contract contained the following agreement (R-10):

> "It is understood further Hall Scott will not be held responsible for any damage to cruiser PACIFICA or for anything taken from same while the engine installation is being made."

The answer also denied negligence on the part of the respondent. The only facts in dispute, because of admissions in the pleadings and stipulations entered into, were—

(1) The value of the vessel and the damage thereto. (R-53.) The trial court found the damage to be Three thousand two hundred ($3200.00) Dollars and this was not disturbed on appeal, although challenged. (R-19.)

(2) Whether or not the damage to the PACIFICA was caused by the negligence of the employees of the respondent. (R-53.) The trial court found in favor of the petitioner (R-19) and this was not disturbed on appeal, although challenged.

(3) Whether the respondent had failed in its contract of bailment to redeliver the boat in good order and condition. (R-53.) The trial court found in favor of the petitioner (R-18) and this was not disturbed on appeal, although challenged.

(4) Whether or not by the clause—

> "It is understood further Hall Scott will not be held responsible for any damage to cruiser PACIFICA or for anything taken from same while the engine installation is being made"

the respondent shipyard bailee for hire shall be free from the consequences of his negligent damage to property entrusted to his care. The trial court found in favor of the plaintiff (R-22), that a shipyard bailee for hire *cannot* contract against negligence when it said—

> ". . . but it is not true that the purported release set forth in the answer was and is a complete or partial or any bar and defense to any recovery by plaintiff against defendant or any one else."

The judgment of the trial court was reversed by the Circuit Court, holding that a shipyard bailee for hire *can* contract against negligence (R-201), although the Circuit Court specifically stated in its opinion that a towboat bailee for hire *cannot* contract against negligence. (R-194.)

IV.

SPECIFICATION OF ERRORS.

The question presented by this appeal is:—(1) The Circuit Court erred in holding that the clause in the bailment contract providing (R-17-18):

> "It is understood further Hall Scott will not be held responsible for any damage to cruiser PACIFICA or for anything taken from the same while this engine installation is being made . . ."

is a valid contract in admiralty against damage due to the negligence of the employees of a shipyard bailee for hire.

V.

ARGUMENT.

The Circuit Court stated in its opinion—

> "It is clear that under the law of California a bailee for hire cannot exculpate himself from his own negligence by contract. *Dieterle v. Bekin*, 143 Cal. 683".
>
> (R-188-189.)

With this, petitioner agrees.

But, said the Circuit Court—

> "While this action is on the law side of the court, the rights of the parties are the same as though it was brought in admiralty. *Chelantis v. Luckenbach S.S. Co.*, 247 U.S. 372, 384; *Union Fish Co. v. Erickson*, 248 U.S. 308; *Nickerbocker Ice Co. v. Stuart*, 253 U.S. 149, 159, 161 . . ."
>
> (R-189.)

With this, petitioner agrees.

The Circuit Court further held the contract in question to be a maritime contract. (R-189.) With this, petitioner agrees.

The Circuit Court then presented the question (R-190):

> "Can the parties to a maritime contract to repair a vessel validly stipulate that the repairer may be free from the consequences of his negligent damage to the vessel in his custody for repairs?"

In discussing the question, the Circuit Court discussed the cases of *Newport News Shipbuilding and Dry Dock Co. v. United States* (C.C.A. 4), 34 Fed.

(2d) 100, and *International M.M.S.S. Co. v. W. A. Fletcher Co.* (C.C.A. 2), 296 Fed. 855, and the cases therein cited.

The *Newport News,* supra, did not deal with a contract against negligence. An examination of the facts discloses that the United States offered two specifications for the repair of its vessel. Under the first, the shipyard was obligated to carry insurance for the benefit both of the bailor, United States, and the bailee, shipyard, at a commercial cost of Five thousand ($5000.00) Dollars. That sum was added to the bid under said first specification. The second specification required that the bailee, shipyard, would have the benefit of the hull insurance placed on the ship by the bailor, United States, and by reason of which the bid was reduced Five thousand ($5,000.00) Dollars to the benefit of the bailor, United States. In this respect the Court said at page 106:

> "The United States accepted the benefit of the Five thousand ($5,000.00) Dollars in the reduced bid of the shipyard. In effect the shipyard paid the United States the same premium it would otherwise have paid a commercial insurance company, and should receive from the United States the same protection it would have received from the commercial company."

Specifically, the Court held the shipyard liable for its negligent damage to the ship; but, in view of the benefit of insurance clause, that the United States could not recover from the shipyard. This was not a contract against negligence. It was no more and no less a contract that in consideration of a reduced bid

of Five thousand ($5000.00) Dollars, that the shipyard should have the benefit of the shipowner's insurance.

In the instant case, the bailor, Hofmann, received nothing for the purported contract against negligence.

In the *Newport News* case, the bailor, United States, received Five thousand ($5000.00) Dollars for its contract for the benefit of insurance.

The Circuit Court quoted certain language from the *Newport News* case, supra, and referred to certain authorities cited therein. Taking those certain authorities in their respective order, they are and can be distinguished as follows:—

McCormick v. Shippy (C.C.A. 2), 124 Fed. 48, and *International Mercantile Marine, etc. v. W. A. Fletcher Co.* (C.C.A. 2), 296 Fed. 855, were both decided by the Circuit Court of Appeals for the Second Circuit.

The Circuit Court of Appeals for the Ninth Circuit made some reference to decisions of the Second Circuit on the particular point when the Circuit Court of Appeals for the Ninth Circuit in *Myroie v. British Columbia Mills, etc.* (C.C.A. 9), 268 Fed. 449, cited the *Syracuse*, 12 Wall. 167, 20 L. Ed. 382, with approval and referred to the *Oceanica* (C.C.A. 2), 170 Fed. 893 (96 C.C.A. 69), and stated:—

> "A careful examination of the prevailing opinion in that case we think shows that the decision was really based upon the law prevailing in the State of New York, under which even a common carrier may contract against its own negligence,

and which may have been the theory upon which the Supreme Court denied the petition for a writ of certiorari in the case."

The Circuit Court for the Ninth Circuit commented unfavorably upon the stand taken by the Second Circuit on the right of a towboat bailee for hire to contract against negligence.

In the *McCormick* case, supra, and influenced as it was by the New York statute permitting a common carrier to contract against negligence, the facts were peculiar and had to do with the charter of a *private* yacht. The charterer took the private yacht subject to an agreement that he did not assume any responsibility for loss or damage to the yacht. The private yacht was not a commercial vessel and there was no commercial transaction. The charterer had no knowledge of navigation. Relying upon the owner, he hired the owner's master upon the recommendation of the owner. The private yacht was lost due to the negligence of the master in not taking on a pilot in waters which were unknown to him, *in spite of the request of the charterer that the master take on a pilot.* The master was really the servant of the owner and not the servant of the charterer. Upon the peculiar facts, it would have been a rank injustice to have held the charterer. It was a case where bad facts make bad law. The case is clearly distinguishable in that—

(1) It was the charter of a private yacht to a private person *who did not deal with the public in a commercial manner* as with a towboat company or a shipyard. There was no dealing with or holding out

to the public. It would have been manifestly unjust to hold the charterer for the negligence of the master of the owner, particularly where the master of the owner acted in disregard of the specific request and instruction of the charterer, and

(2) The law of New York at the time permitted a common carrier to contract against its own negligence. Again we refer to the comment made by the Circuit Court for the Ninth Circuit in the *Myroie,* supra, as follows:

> "A careful examination of the prevailing opinion in that case we think shows that the decision was really based upon the law prevailing in the State of New York, under which even a common carrier may contract against his own negligence, and such may have been the theory upon which the Supreme Court denied the petition for a writ of certiorari in the case."

In the *International* case, supra, the Court held that the relationship between the shipowner and the shipyard was that of bailment. The shipyard bailee endeavored *unsuccessfully* to escape liability on the grounds that the bailee had contracted for the benefit of the bailor's insurance. The only points decided by the Court in that case were that the bailee was negligent and that the bailee had not proven that it had contracted with the bailor for the benefit of the bailor's insurance. Accordingly, that the bailee was liable. That is the total extent of the holding in the *International* case, supra. There was no holding that a bailee for hire can contract against its negligence

and to cite the *International* case, supra, as an authority for that point, is to use an improper and unauthorized citation.

The case of *Santa Fe Railway Co. v. Grant,* 228 U.S. 177, 33 Sup. Ct. 474, 57 L. Ed. 787, is not an admiralty case *but a common law case.* It merely holds that where a railroad company is transporting free or at reduced rate, contractors' supplies for work done by the contractor on the track bed of the railroad company, that the railroad company is not a common carrier and is entering into an entirely private deal. It would be erroneous to say that this case supports an admiralty rule. It does not even follow the majority common law rule.

The Circuit Court recognized that the authorities cited in the *Newport News* case, supra, as authority for the proposition that a bailee for hire can contract against negligence, were not persuasive and the Circuit Court said:

> "It thus appears that the authorities cited by the Circuit Court of Appeals for the Fourth Circuit in support of its conclusion in the *Newport News* case, supra, do so *only by assuming the analogy of the case of a charterer and of a private carrier to a bailment of a vessel for repairs.*"

Yet, in the *Newport News* case *(which does not hold that a bailee for hire can contract against liability for its negligence)* the Court stated a principle which is not supported by the authorities cited.

The Circuit Court in the within case then stated:

"If these decisions of the Supreme Court and of this Court are applicable to a maritime contract to repair a ship it is clear that such a contract to exculpate the contractor for his negligence is invalid." (R-194.)

"These decisions" cited by the Court are:

The *Steamer Syracuse etc. v. Langley,* 12 Wall. 167, 20 L. E. 382, and

Compania de Navigacion v. Ins. Co., 277 U.S. 66, and

Alaska Commercial Company v. Williams (C.C.A. 9), 128 Fed. 362, and

Myroie v. British Columbia, etc. (C.C.A. 9), 268 Fed. 449, and

Sacramento Navigation Co. v. Salz (C.C.A. 9), 3 Fed. (2d) 759.

An examination of the facts in the *Syracuse,* supra, the *Compania,* supra, the *Myroie,* supra, and the *Sacramento Navigation Co.,* supra, will disclose that each case was *an admiralty case involving bailment. In each case the bailee attempted unsuccessfully to contract against the consequences of his negligent damage to property entrusted to his care.*

The *Alaska Commercial Company* case, supra, was on the law side of the Court. The admiralty rule was held to apply and the *Syracuse,* supra, was followed. An examination of the facts clearly discloses that *a bailee for hire relationship existed and the bailee attempted unsuccessfully to contract against the*

consequences of his negligent damage to property entrusted to his care.

The Circuit Court admitted by the quotation from its opinion:

> *"if these decisions of the Supreme Court and of this Court are applicable to a maritime contract to repair a ship it is clear that such a contract to exculpate the contractor for his negligence is invalid."* (R-194.)

Accordingly, the judgment of the District Court should have been affirmed, not reversed. The within case is clearly an admiralty bailee for hire case. The foregoing cases are clearly admiralty bailee for hire cases. And yet the Circuit Court said:

> "But there are other decisions involving contracts exculpating a party from the results of his negligence which are cited as analogous and, consequently, as bearing upon the question." (R-194.)

An examination of these "other decisions" discloses that they are not analogous for the following reasons:

(1) The *Sun Oil* case, 287 U. S. 291 (R-195) *does not refer to a bailment* as evidenced by the language of the Court where, on page 294, the Court said:

> *"Respondent was not a common carrier or bailee or bound to serve or liable as such."*

(2) The *Sante Fe* case, supra (R-196) *was a common law case* and not an admiralty case, and therefore should not have been cited as an authority for an admiralty rule.

(3) *Baltimore and Ohio, etc. v. Voight,* 176 U. S. 498 (R-196) *was a common law case and not an admiralty case and did not involve the relationship of bailee for hire,* and accordingly, should not have been cited as an authority for an admiralty bailee for hire rule.

(4) *Robinson v. Baltimore and Ohio, etc. Co.,* 237 U. S. 84 (R-197), *was a common law case and not an admiralty case and did not involve the relationship of bailee for hire,* and accordingly, should not have been cited as an authority for an admiralty bailee for hire rule.

(5) *Ringling Brothers, etc. Shows v. Olivera* (C.C.A. 9), 119 Fed. (2d) 584 (R-198), *was a common law case and not an admiralty case and did not involve the relationship of bailee for hire,* and accordingly, should not have been cited as an authority for an admiralty bailee for hire rule. It pertained to the right of a trapeze artist under the Florida law.

Petitioner contends that the *admiralty bailee for hire* cases beginning with the *Syracuse,* supra, are controlling and that the judgment of the District Court should have been affirmed.

Yet, the Circuit Court disregarded the *Syracuse,* supra, and other cases so holding, and instead followed as analogous:

(1) The *Sun Oil* case, supra, an *admiralty non-bailment* case, and

(2) The *Santa Fe* case, supra, a *common law* case, and

(3) The *Baltimore and Ohio v. Voight* case, supra, and the *Robinson v. Baltimore and Ohio, etc.,* case, supra, and the *Ringling Bros.* case, supra, *all common law cases not involving bailment.*

In the petition for a rehearing, petitioner asked:

> "How can the Court conclude that nonbailment cases are analogous to bailment cases or that common law cases are analogous to admiralty cases, particularly when that same Court stated that the common law rule cannot be followed?"

And yet, that is precisely the effect of the Circuit Court's decision.

Petitioner contends that there is no theory in law nor should there be any legal theory that justifies one rule of law with respect to a bailee for hire tow boat company and precisely the opposite theory of law with respect to a bailee for hire shipyard.

The Circuit Court recognized (R-200-201) the general common law rule that to permit a bailee to contract against his own negligence is in conflict with public policy. The rule is well stated in 6 Am. Juris. page 270, par. 176, as follows:

> "The right of the bailee to make a contract exempting him from liability due to his negligence or the negligence of his employees has been the source of apparently conflicting decisions. In many of the opinions where the question has been discussed, the direct question was not involved.
>
> "The weight of modern authority supports the rule that parties to a bailment cannot, by provisions in their contract, relieve the bailee from the

> performance of the duty of care or exonerate him from the liability for his own negligence which is imposed by law upon bailees of his particular class. It is now apparently well settled that a bailee for hire cannot, by contract, exempt himself from liability for his own negligence or that of his agents or servants. Contracts limiting liability for negligence in bailments for hire in the course of a general dealing with the public are generally regarded as against public policy. In jurisdictions where statutes exist defining a bailee's duty of care, even though such statutes are merely declaratory of the common law, they are regarded as indicative of public policy, and the general rule applied in the cases passing on the question is that a bailee has no right to limit the degree of care to less than that fixed by the statute."

The foregoing quotation is precisely in keeping with the admiralty bailee for hire rule enunciated by this Court in the *Syracuse,* supra, and the *Compania,* supra.

Petitioner contends that the law should seek harmony, not friction. Harmony will result from the admiralty shipyard bailee for hire rule following the present admiralty towboat bailee for hire rule and the present general common law bailee for hire rule.

Friction and confusion will result from the admiralty shipyard bailee for hire rule being enunciated precisely to the contrary to the present admiralty towboat for hire rule and the present common law bailee for hire rule.

The Circuit Court, in discussing these *nonbailment* cases and contending for their applicability to the within admiralty bailment case, stated the question to be as to whether or not there was a duty of public service which affects the validity of the contract, and stated (R-200):

> "Here the parties were free to contract in any manner they chose. The motor car company was in no sense a public utility or charged with a public duty. The shipowner was at liberty to select any vendor of engines to replace the old engine, and to employ the seller or anyone else to install it."

Let us use the same wording just quoted but instead inserting "towboat company" for "motor car company" and by amending the wording only so far as necessary as to fit the circumstances and to cover the factual situation in each of the towboat bailee for hire cases. We will find:

> "Here the parties were free to contract in any manner they chose. The towboat company was in no sense a public utility or charged with a public duty. The shipowner was at liberty to select any towboat company to tow the vessel and to employ the towboat company or anyone else to tow his vessel."

Wherein is the difference? This Court stated in the *Syracuse,* supra, and the *Compania,* supra, that the relationship described would not permit of a contract against liability for negligence. Yet the Circuit Court herein held squarely to the contrary.

The attempt by the Circuit Court to hold this transaction to be an isolated private deal is directly contrary to the record. Leland Scott, secretary and sales manager of respondent, testified that the general nature of the business of respondent was handling marine, bus, industrial and all different types of motors. Respondent installed many of them on small boats. He qualified himself as an expert in the values of small boats by reason of his extensive dealings with the public on small boats on behalf of respondent. (R-136, 142 and 143.) This, it is submitted, is a course of dealing with the public which gave rise to the general rule that public policy forbids a contract by a bailee for hire whereby the bailee for hire shall be free from the consequences of his own negligence to property entrusted to his care.

Petitioner contends that the Circuit Court has gone out of its way in such a manner as to indicate a prejudice against petitioner insurance company. In doing so the Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The Court said (R-202):

> "The practical effect of the agreement between the parties was to give the motor car company the benefit of the fire insurance coverage of the owner of the gasoline launch during the short period necessary for the removal of one engine and the installation of another. *It is true that the contract does not mention insurance,* but if, as seems likely the parties had such insurance in mind, it is certainly an anomaly to permit the

insurance company to recover from the motor car company on the ground that the insured had no right to make such a contract."

The long four-or-five page closely-printed conditional sales contract prepared by the respondent for its own use makes no reference to benefit of insurance. If the parties intended that the respondent should have the benefit of petitioner's insurance, why did they not say so and include such agreement specifically in the long printed contract form prepared by respondent. They did not do so as admitted by the Circuit Court. *There is not one shred of evidence that even by implication would justify the statement of the Circuit Court just quoted.* Further, the Circuit Court made this statement in spite of the subsequent agreement entered into between Hofmann and respondent on May 12, 1940, wherein Hofmann released his personal claims against respondent but the agreement stated (R-203):

"* * * and the within release does not purport to be, nor is it a waiver of any claim that the Universal Insurance Company might have by reason of the said payment."

Would Hofmann and respondent, on May 12, 1940:

"save the rights of the insurance company"

if Hofmann and respondent intended in January, 1940, that the insurance company would not have any rights? Obviously not. This language of the Circuit Court, petitioner contends, clearly discloses a prejudice against the petitioner insurance company which

has honorably and without litigation met its liability to its insured, so as to favor a shipyard which is endeavoring to escape a liability that is morally, and we contend legally, theirs.

CONCLUSION.

Upon the foregoing considerations, we ask this Court to issue its writ of certiorari, and to reverse the decision of the Circuit Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
October 22, 1941.

Respectfully submitted,
ROBERT B. GAYLORD,
Counsel for Petitioner.

GEORGE H. HAUERKEN,
Of Counsel.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 716

UNIVERSAL INSURANCE COMPANY
(a corporation),
Petitioner,

vs.

HALL-SCOTT MOTOR CAR COMPANY
(a corporation),
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

No question is presented by the petition for writ of certiorari justifying the granting of such petition.

POINT 1.

The decision in this case is not in conflict with local decisions inasmuch as it is governed by admiralty law and no question of local law is involved.

POINT 2.

The record clearly establishes that the Circuit Court of Appeals did not depart from the accepted and usual course of judicial proceedings.

POINT 3.

The decision in this case is not in conflict with the decisions of this Honorable Court or those of any Circuit Court of Appeals on the same matter.

POINT 4.

No other reasons for granting the petition are stated by petitioner and none in fact exists.

RESPONDENT'S SUMMARY OF MATTER INVOLVED.

This case involves the validity of a maritime contract by which respondent engine manufacturer freed itself from liability for damage negligently done to a boat while in its possession for the purpose of installing an engine therein.

Petitioner's description of respondent as a shipyard "bailee for hire" (Pet. 2, 16, 17) and "a bailee for hire" (Pet. 13) is misleading. If by this description petitioner intends to convey the idea that respondent was acting as a public depositary for safekeeping or a public warehouseman for hire, then the term is incorrect. No such status existed. The Circuit Court of Appeals held (R. 199-200, 201) "Here the parties were free to contract in any manner they chose. The motor car company was in no sense a public utility or charged with a public duty. The ship-

owner was at liberty to select any vendor of engines to replace the old engine and to employ the seller or anyone else to install it'' (R. 200).

''* * * We can see nothing in the relations between the parties which would prevent them from negotiating a contract at arm's length and consequently nothing which would prevent them from exculpating the motor car company for injuries to the vessel resulting from its negligence while in its possession'' (R. 201).

The relationship between petitioner and respondent arose when Hofmann, the purchaser of the boat ''Pacifica'', contacted respondent to purchase a reconditioned Invader engine for installation in the ''Pacifica'' (R. 64). Respondent's printed form conditional sales agreement, dated January 4, 1940, was executed by Hofmann and respondent wherein the Invader engine was sold on time to Hofmann. By added typed clauses it was agreed that respondent would remove the old engine and install the Invader engine in the ''Pacifica'' (R. 55) and further that:

> ''It is understood further Hall-Scott will not be held responsible for any damage to cruiser 'Pacifica' or for anything taken from the same while this engine installation is being made'' (R. 17-18).

Hofmann testified that the ''Pacifica'' was delivered to respondent under the terms and provisions of that conditional sales agreement (R. 78-79) and petitioner admits as much (Pet. 13).

Possession of the boat by respondent was purely a matter of convenience. Such possession was not required by the contract with Hofmann. The engine installation

could just as conveniently have been made at premises not operated by respondent provided suitable equipment was available. The delivery of the vessel to respondent was not for storage or for safekeeping but was entirely incidental to the sale and installation of the Invader engine.

Hence it is clear that (1) there was no bailment for hire in the sense of a bailment or deposit for safekeeping; (2) the possession by respondent was entirely incidental to the contract for sale of the engine; (3) the parties dealt at arm's length; (4) the agreement concerned only their private affairs; and (5) the respondent was not charged with a public duty.

QUESTION PRESENTED.

The Circuit Court of Appeals correctly stated the question as follows:

> "Can the parties to a maritime contract to repair a vessel validly stipulate that the repairer may be freed from the consequences of his negligent damage to the vessel in his custody for repairs?" (R. 190)

and answered it in the affirmative (R. 201).

ARGUMENT.

This petition for certiorari is merely an attempt by the losing party to obtain an additional hearing. There is neither rule nor reason for granting the petition.

POINT 1.

The decision in this case is not in conflict with local decisions inasmuch as no question of local law is involved. The contract in question is of a maritime character and is therefore governed by federal admiralty law to the exclusion of local or state law (*Carlisle Packing Co. v. Sandanger*, 259 U. S. 255, 259). This is conceded by petitioner (Pet. 18) and is so declared by the Circuit Court of Appeals, even though the action was filed on the law side of the Court (R. 189).

POINT 2.

The record clearly establishes that the Circuit Court of Appeals did not depart from the accepted and usual course of judicial proceedings. In its brief (Pet. 30-32) petitioner charges the Circuit Court of Appeals with "prejudice against the petitioner insurance company". The decision was rendered unanimously by the three Judges the Court holding:

> "However, we do not base our decision upon the fact that there was fire insurance in the case at bar" (R. 202).

POINT 3.

The decision in this case is not in conflict with the decisions of this Honorable Court or that of any Circuit Court of Appeals on the same matter. There are neither Supreme Court of the United States cases nor Circuit Court

of Appeals cases which are opposed to the decision in this matter. This decision accepts and follows the only Circuit Court of Appeals decisions on the point.

Newport News Shipbuilding & Drydock Co. v. United States, 34 Fed. (2d) 100 (C. C. A. 4, 1929). Admiralty case. The Court considered the effect of an agreement on the part of the United States to maintain insurance contained in a contract for the repair of one of its vessels. The majority of the Court held that under the agreement the shipyard was exempted from the loss due to its negligence in causing fire while the ship was undergoing repair to the extent of the agreement of the government to maintain fire insurance. Judge Parker dissented but *all agreed that a contract could be made relieving the shipyard from liability for its negligence.** Judge Parker in dissenting said "While of course it is permissible to contract against liability for negligence, no contract ought to be construed to have that effect unless the intention clearly appears." Citing, *McCormick v. Shippy*, 124 Fed. 48, 51 (C. C. A. 2, 1903); *International Mercantile Marine S.S. Co. v. W. & A. Fletcher Co.*, 296 Fed. 855 (C. C. A. 2, 1924). The majority said: "We agree with the Judge below when he said 'there can be no doubt, I think, that *a contract whereby the United States agreed to assume all liability for damage to this vessel while at the yard would be valid.*'" Citing, *Santa Fe etc. Ry. Co. v. Grant Bros. Construction Co.*, 228 U. S. 177.

See also, *International Mercantile Marine S.S. Co. v. W. & A. Fletcher Co.*, 296 Fed. 855 at 860 (C. C. A. 2, 1924), certiorari denied, 264 U. S. 598, 68 L. ed. 868.

*Italics supplied unless otherwise noted.

ANALOGOUS CASES.

Supreme Court of the United States:

Santa Fe, etc. Ry. Co. v. Grant Bros. Construction Co., 228 U. S. 177, 57 L. ed. 787, a leading civil case which holds that a common carrier, when contracting in the capacity of a private carrier, may exonerate itself from liability for damage to property bailed to it for transportation caused by negligence of its own employees.

Wells Fargo & Co. v. Taylor, 254 U. S. 175, 65 L. ed. 205. Civil case. A contract by an employee of an express company whereby he assumed all risks and assented to a contract between a railroad and express company freeing the railway company from liability for negligence to employees of the express company is valid because the railroad was not contracting as a "public service" company.

Robinson v. Baltimore, etc. Co., 237 U. S. 84, 59 L. ed. 849. Civil case. The same rule as the preceding case applied to employees of the Pullman Company.

B. & O. etc. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 560, Civil case. A factual situation similar to the preceding case.

Southern Railway Co. v. Prescott, 240 U. S. 632, 60 L. ed. 836. Civil case. A lease clause exonerating the railroad company from liability for negligence is valid.

Hartford, etc. Co. v. Chicago, etc. Co., 175 U. S. 91, 44 L. ed. 84. Civil case. A lease clause, same ruling as preceding case.

Luckenbach v. W. J. McCahan, etc. Co., 248 U. S. 139, 63 L. ed. 170. Admiralty case. "Benefit of insurance" clauses are valid.

Circuit Court of Appeals, Second Circuit:

McCormick v. Shippy, 124 Fed. 48 (C. C. A. 2, 1903), an admiralty case quoted with approval in the *Santa Fe Railway Co.* case, supra, which holds valid a clause in a bareboat charter of a yacht exonerating the charterer as bailee from liability for loss or damage to the yacht.

The G. R. Crowe, 287 Fed. 426 (Dist. Ct., Southern District New York, 1922). Admiralty. Contract for private charter of a vessel. Clause exonerating owner as bailee for transportation from liability for negligence held valid.

Berwind White Coal Mining Co. v. United States, 15 Fed. (2d) 366 (C. C. A. 2, 1926), a civil case. A clause in a bareboat charter providing "the owner assumes the marine and all other risks (including risks usually covered by protection and indemnity insurance)" held valid and excused the bailee from liability for damage caused by its negligence.

The Elizabeth Edwards, 27 Fed. (2d) 747, 1928 A. M. C. 1281 (C. C. A. 2, 1928). Admiralty case. A private water carrier contracted with cargo bailed to it for transportation to be free from liability for its own negligence. Clause held valid.

The Westmoreland, 86 Fed. (2d) 96, 1936 A. M. C. 1680 (C. C. A. 2, 1936). Admiralty case. A clause in a contract by a private carrier imposing on charterer the risk of damage by stowage on ship's skin to goods bailed to the vessel for transportation, held valid.

Circuit Court of Appeals, Fourth Circuit:

Standard Oil Co. v. United States, 264 Fed. 66 (C. C. A. 4, 1920). Admiralty case. A contract between Raymond Concrete Pile Co. as contractor and Standard Oil Co. whereby the latter assumed all risk of liability for damage done by the contracting company to person or property of third persons was held valid.

Cacey v. Virginian Railway Co., 85 Fed. (2d) 976 (C. C. A. 4, 1936) (cert. denied, 300 U. S. 657). Civil case, decided that a railway while contracting as a private carrier may exempt itself by contract from liability for damage caused by its negligence to goods bailed to it for transportation.

Circuit Court of Appeals, Seventh Circuit:

Chicago M. & St. P. R. Co. v. Wallace, 66 Fed. 506 (C. C. A. 7, 1895). Clause in a contract of a railroad company contracting as a private carrier and bailee for transportation exonerating it from liability for damage to property caused by negligence of its employees held valid.

World's Columbian Exposition Co. v. Republic of France, 96 Fed. 687 (C. C. A. 7, 1899). Civil case holding a contract of an exposition company exonerating itself from liability for negligent damage done to property in its possession is valid. Bailment for benefit of both parties.

Circuit Court of Appeals, Ninth Circuit:

Ringling Bros. etc. Shows, Inc. v. Olvera, 119 Fed. (2d) 584 (C. C. A. 9, 1941). Civil case. It was held that the

parties to a contract could exculpate one of them from liability for personal injuries resulting from the effect of his negligence for which he would be liable under the common law.

Contract Made at Arm's Length.

There was no duty of public service involved. The parties dealt at arm's length and the shipowner was at liberty to select any vendor of engines to replace the old engine and to employ the seller or anyone else to install it (R. 200-201). This Court, in the case of *Sun Oil Co. v. Dalzell Towing Co.*, 287 U. S. 291, 77 L. ed. 311, an admiralty case (77 L. ed. 311, 313), held:

> "* * * Respondent had no exclusive privilege or monopoly in respect of the services that petitioner desired to have performed for its tanker. And petitioner was under no compulsion to accept the terms of respondent's pilotage clause. There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length. 'There is no rule of public policy which denies effect to their expressed intention, but on the contrary as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made.' Santa Fe, P. & P. R. Co. v. Grant Bros. Construction Co., 228 U. S. 177, 188, 57 L. ed. 787, 793, 33 S. Ct. 474."

Towage Cases.

The towage cases are *sui generis*. Furthermore, the towage cases are distinguishable inasmuch as they are not bailment cases. Thus, in *Sun Oil Co. v. Dalzell Towing*

Co., 287 U. S. 291, 77 L. ed. 311, at 313, it was held in part:

> "* * * Towage does not involve bailment. * * * Stevens v. The White City, 285 U. S. 195, 200, 76 L. ed. 699, 702, 52 S. Ct. 347; * * *."

A decision in the tug and tow situation is therefore not relevant in our situation because the tug and tow situation is a peculiar type of relationship substantially different from our situation or from any other similar type situation. The tug and tow cases are the only exception with which we are familiar to the general rule which permits parties not engaged in public service to contract against liability for negligence and even this exception is qualified by permitting the tug to contract that the tug master shall be considered an employee of the tow, thereby freeing the tug from liability for the master's negligence. *Sun Oil Co. v. Dalzell Towing Co.*, 287 U. S. 291, 77 L. ed. 311.

The admiralty rule is now well settled and generally accepted that parties contracting in a private capacity such as private carriers and ship repair yard cases, may exonerate themselves from liability for damage done to property in their possession by reason of negligence of their employees. There is neither rule nor reason justifying this Court in upsetting these lines of cases and on the contrary, the line of cases which is confined to non-bailment towage cases is dissimilar in principle and fact and should not be controlling in this situation.

The granting of this petition for certiorari will tend to create confusion. A denial of the petition for writ of

certiorari will perpetuate the universally accepted and harmonious lines of cases on the question involved.

CONCLUSION.

It is respectfully requested that this Honorable Court deny the petition for writ of certiorari.

Dated, San Francisco, California,
November 14, 1941.

Respectfully submitted,

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CLARENCE G. MORSE,
Of Counsel.